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Kentucky v. Whorton and the Presumption-of-Innocence Instruction: An Imprecise Formula for Appellate Review

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COMMENTS

KENTUCKY v. WHORTON AND THE PRESUMPTION-OF-INNOCENCE INSTRUCTION: AN IMPRECISE FORMULA FOR APPELLATE REVIEW

INTRODUCTION

Although the presumption of the defendant's innocence in criminal trials[1] is not expressly required by the United States Constitution, it has long been accepted as a fundamental principle of criminal law.[2] Acknowledging this principle, the federal courts[3] and many state courts[4] hold that it is error to refuse a proper instruction on the presumption of innocence. Until recently, however, Kentucky courts have held that the accused

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[1] "[T]he accused is presumed to be innocent until proved guilty." S. GARD, JONES ON EVIDENCE § 3.11 (6th ed. 1972).

[2] Coffin v. United States, 156 U.S. 432 (1895). The following anecdote quoted in *Coffin* indicates that the presumption of innocence was a part of the early Roman law.

> Numerius, the governor of Narkonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, "a passionate man," seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, "Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "If it suffices to accuse, what will become of the innocent?"

Id. at 455 (quoting Rerum Gestarum, lib. XVIII, c.1).

"Injuria non praesumintur" (a wrong is not presumed) and "odiosa non praesumunter" (odious things are not presumed) were two common law adages in criminal trials. S. GARD, JONES ON EVIDENCE § 3.11 (6th ed. 1972).

[3] *E.g.*, Coffin v. United States, 156 U.S. 432 (1895); United States v. Thaxton, 483 F.2d 1071, 1073 (5th Cir. 1973); Reynolds v. United States, 238 F.2d 460, 463 (9th Cir. 1956); McAffee v. United States, 105 F.2d 21, 30 (D.C. Cir. 1939); Miklencic v. United States, 62 F.2d 1044 (3d Cir. 1933).

[4] *E.g.*, Taylor v. State, 272 So.2d 905 (Ala. Crim. App. 1973); Houston v. State, 5 So. 48 (Fla. 1888); Ealey v. State, 232 S.E.2d 620 (Ga. Ct. App. 1977); People v. Donald, 315 N.E.2d 904 (Ill. App. Ct. 1974); Farley v. State, 26 N.E. 898 (Ind. 1891); Commonwealth v. Anderson, 139 N.E. 436, 440 (Mass. 1923); People v. McClintic, 160 N.W. 461, 465 (Mich. 1916); State v. Sailor, 153 N.W. 271 (Minn. 1915); Gilleylen v. State, 255 So.2d 661, 664 (Miss. 1971); People v. Leavitt, 92 N.E.2d 915, 917 (N.Y. 1950); Roberts v. State, 239 S.W. 960, 961 (Tex. Crim. App. 1922); Whaley v. Commonwealth, 200 S.E.2d 556 (Va. 1973); State v. McHenry, 558 P.2d 188 (Wash. 1977).

is not entitled to a presumption-of-innocence instruction[5] as long as the trial court instructs the jury that the defendant's guilt must be proved beyond a reasonable doubt.[6] Accordingly, the Kentucky Court of Appeals held in *Taylor v. Commonwealth*[7] that it was not error to refuse the accused's tendered presumption-of-innocence instruction. The United States Supreme Court reversed the decision in *Taylor v. Kentucky*[8] and held that "on the facts of this case the trial court's refusal to give petitioner's requested instruction on the presumption of innocence[9] resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment."[10]

Subsequently, the case of *Whorton v. Commonwealth*[11] presented anew to the Supreme Court of Kentucky the instruction issue. In *Whorton,* the Kentucky Supreme Court interpreted the United States Supreme Court's decision in *Taylor* "to mean that when an instruction on the presumption of innocence is asked for and denied there is reversible error."[12] The Kentucky Court's interpretation of *Taylor* in effect created a

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[5] Kentucky courts have denied the instruction on the theory that including presumptions in the jury instructions disturbs the jury's exclusive responsibility to weigh the evidence and determine guilt or innocence. Whorton v. Commonwealth, 570 S.W.2d 627, 632 (Ky. 1978), *rev'd,* 441 U.S. 786 (1979). Pursuant to this policy, Kentucky has favored extremely simple jury instructions that avoid "abstract legal principles, presumptions, and comments on the weight of the evidence." *Id. Accord,* Cox v. Cooper, 510 S.W.2d 530, 535 (Ky. 1974) (instructions ought to provide "only the bare bones"); Webster v. Commonwealth, 508 S.W.2d 33, 36 (Ky. 1974).

[6] Swango v. Commonwealth, 165 S.W.2d 182 (Ky. 1942); Baker v. Commonwealth, 134 S.W.2d 997 (Ky. 1939); Mink v. Commonwealth, 15 S.W.2d 463 (Ky. 1929); Brown v. Commonwealth, 249 S.W. 777 (Ky. 1923); Cane v. Commonwealth, 556 S.W.2d 902 (Ky. Ct. App. 1977).

[7] 551 S.W.2d 813 (Ky. Ct. App. 1977), *rev'd,* 436 U.S. 478 (1978).

[8] 436 U.S. 478 (1978).

[9] Petitioner requested the following instruction:

> The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a "clean slate." That is with no evidence against him. The law permits nothing but legal evidence presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

Id. at 480 n.5.

[10] *Id.* at 490.

[11] 570 S.W.2d 627 (Ky. 1978), *rev'd,* 441 U.S. 786 (1979).

[12] 570 S.W.2d at 633.

constitutional right to a requested presumption-of-innocence instruction; the Court held that the constitutional right was not subject to the harmless-error rule, but rather mandated automatic reversal in face of an error.[13] Subsequent to the Kentucky Supreme Court's decision in *Whorton,* Kentucky Rule of Criminal Procedure (RCr) 9.56 was amended to require the presumption-of-innocence instruction in every criminal trial.[14]

The Commonwealth of Kentucky petitioned and was granted certiorari to the United States Supreme Court[15] to consider whether in deciding *Whorton v. Commonwealth* the Supreme Court of Kentucky misinterpreted *Taylor.* The Commonwealth argued that *Taylor* did not establish a constitutional right but, instead, was limited to its extraordinary facts.[16] Alternatively, the Commonwealth argued that even if *Taylor* created a constitutionally-mandated requirement, the harmless-error rule should be applied.[17]

In *Kentucky v. Whorton,*[18] the focus of this comment, the United States Supreme Court reversed the judgment of the Supreme Court of Kentucky and remanded the case, holding that the Supreme Court's decision in *Taylor* did not create a constitutional right to the presumption-of-innocence instruction. The Court emphasized that the cumulative effect of errors in *Taylor* was critical to the decision in that case, and held that failure to give a requested instruction on the presumption of innocence "must be evaluated in light of the totality of the circumstances . . . to determine whether the defendant received a constitutionally fair trial."[19]

To establish a working background for an analysis and understanding of the *Whorton* decision, it is imperative to distinguish initially between the presumption-of-innocence instruction and other constitutional protections afforded the criminal defendant.[20] Secondly, it is necessary to emphasize

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[13] *Id.*

[14] KY. R. CRIM. P. 9.56 (amended 1978) [hereinafter cited as RCr].

[15] Kentucky v. Whorton, 439 U.S. 1067 (1979).

[16] Brief for Plaintiff at 10, Kentucky v. Whorton, 441 U.S. 786 (1979).

[17] *Id.* at 16.

[18] 441 U.S. 786 (1979).

[19] *Id.* at 786.

[20] *See* text accompanying notes 24-44 *infra* for this discussion.

the factual differences in the *Taylor* and *Whorton* trials.[21] In light of this background, analysis of the *Whorton* decision will indicate that the United States Supreme Court has imposed an imprecise formula on appellate courts.[22] Essentially, the Court's decision in *Whorton* changes the focus of appellate review from an inquiry into whether the trial court gave a presumption-of-innocence instruction to a determination of whether the defendant received a fair trial considering all of the circumstances. The *Whorton* opinion offers reviewing courts little guidance in determining when the cumulative effect of errors by the trial court results in an "unfair" trial; similarly, the decision fails to delineate the role of the presumption-of-innocence instruction in both "curing" errors and overcoming the cumulative effect of those errors. Finally, it is important to consider the effect that the *Whorton* decision will have on Kentucky law in light of the amended RCr 9.56.[23]

I. A WORKING BACKGROUND

A. *The Presumption-of-Innocence Instruction Vis-à-Vis Established Constitutional Rights*

1. *The Purpose of the Presumption of Innocence*

The principle that the accused is innocent until proven guilty is actually not a presumption; rather it is a fundamental assumption[24] of criminal law.[25] This assumption serves two purposes in a criminal trial: it assigns the burden of proof to the prosecution, and it warns the jury that only legal evidence is

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[21] *See* text accompanying notes 45-62 *infra* for this discussion.

[22] *See* text accompanying notes 63-69 *infra* for this analysis.

[23] *See* text accompanying notes 70-86 *infra* for this discussion.

[24] The "presumption" of innocence is a misnomer. It is really an "assumption" because it is assumed that a man's actions are lawful until there is sufficient proof to counter that assumption. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 342 (2d ed. 1972). A true presumption consists of a basic fact which supports a finding of an inferred fact. A typical presumption is the mailed-received pattern. For example, if facts indicate that a letter was properly addressed and mailed, it is inferred that the addressee received it. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 16 (1978).

[25] "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

relevant to the verdict.[26]

While the early position that the presumption-of-innocence instruction is evidence in favor of the accused[27] has been repudiated,[28] scholars and courts still uphold the distinction made in *Coffin v. United States*[29] between the reasonable doubt instruction[30] and the presumption-of-innocence instruction.[31] In *Taylor*, the United States Supreme Court held that an instruction on reasonable doubt did not obviate the need for a presumption-of-innocence instruction in view of the "special purpose" for the latter.[32] The presumption-of-innocence instruction assigns the burden of proof and admonishes the jury, while the reasonable doubt instruction specifies the requisite quantity of proof.[33] Thus, the presumption-of-innocence instruction serves a separate, viable function.

2. *The Presumption-of-Innocence Instruction: A Constitutional Right?*

Although Kentucky clearly accepts and applies the presumption-of-innocence principle in criminal trials,[34] jury instruction on the presumption of innocence had been proscribed prior to *Taylor* as part of the philosophy that jury instructions should not be encumbered by presumptions or references to the burden of proof.[35] While the federal courts tender

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[26] *See* 9 WIGMORE ON EVIDENCE § 2511 (1940 & Supp. 1979).

[27] Coffin v. United States, 156 U.S. 432 (1895).

[28] Agnew v. United States, 165 U.S. 36, 51 (1897).

[29] 156 U.S. 432 (1895).

[30] The accused must be proven guilty beyond a reasonable doubt. *In re* Winship, 397 U.S. 358 (1970).

[31] Cochran v. United States, 157 U.S. 286 (1895); Coffin v. United States 156 U.S. 432 (1895); People v. Long, 95 N.E.2d 461 (Ill. 1950); Taylor v. Commonwealth, 551 S.W.2d 813, 814 (Ky. Ct. App. 1977) (Wilhoit, J., dissenting), *rev'd*, 436 U.S. 478 (1978). *See* S. GARD, JONES ON EVIDENCE, § 3.11 (6th ed. 1972).

[32] 436 U.S. at 488.

[33] *See* S. GARD, JONES ON EVIDENCE § 3.11 (6th ed. 1972).

[34] "The notion that a man is presumed innocent until proven guilty is every bit as firmly embedded in the criminal law of Kentucky as in its federal counterpart . . . ." Whorton v. Commonwealth 570 S.W.2d 627, 636 (Ky. 1978) (Clayton, J., dissenting), *rev'd* 441 U.S. 786 (1979).

[35] *See* Mason v. Commonwealth, 565 S.W.2d 140 (Ky. 1978) (presumption of sanity to be deleted from future instructions); Goodwin v. Commonwealth, 283 S.W. 420, 423 (Ky. 1926) (reference to presumption of innocence was properly refused as argumentative); Brown v. Commonwealth, 249 S.W. 777, 778 (Ky. 1923) (while an

the presumption-of-innocence instruction,[36] the question of constitutional right to the instruction allegedly was not decided prior to the *Taylor* and *Whorton* cases.[37] Although the presumption in a criminal trial that the accused is innocent until proven guilty is a fundamental tenet of our criminal law,[38] the United States Supreme Court's decision in *Whorton* indicates that failure to give the presumption-of-innocence instruction does not alone abridge the constitutional rights of a criminal defendant.[39]

The Supreme Court's decision in *Whorton* is based in part upon the distinction between those errors that substantially affect the defendant's constitutional rights and thus require reversal and other errors, like the omission of the presumption-of-innocence instruction, that do not require automatic reversal. Errors which substantially affect the constitutional rights of the defendant are those which are obviously prejudicial[40] or

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instruction on the presumption of innocence "fairly presents the law," it is more favorable to the defendant than that to which he is entitled). *See* note 5 *supra* for an explanation of the theory underlying Kentucky's historic refusal to allow any reference to the presumption of innocence in jury instructions. However, KY. R. CRIM. P. 9.56 was amended subsequent to *Taylor* to require the presumption-of-innocence instruction "in every case."

[36] *See* note 3 *supra* for citation to federal courts upholding the presumption-of-innocence instruction.

[37] Howard v. Fleming, 191 U.S. 126 (1903) (state court's refusal to give presumption-of-innocence instruction held not to be denial of due process), was distinguished in *Taylor,* 436 U.S. at 489. The Court stated that the briefs for the appellants in *Howard* argued that the accused was entitled to an instruction that the presumption of innocence was "evidence" to be considered in their favor. The Supreme Court had repudiated the concept in Agnew v. United States, 165 U.S. 36 (1897). The Court in *Taylor* stated that "*Howard* held only that the accused is not entitled to an instruction that the presumption of innocence is 'evidence'." 436 U.S. at 490.

Curiously, the *Howard* opinion makes no reference to the alleged specificity of the requested instruction or to the appellant's brief. Rather, the Court stated that in the face of state law, "the omission in a state trial of any reference to the presumption of innocence cannot be regarded as a denial of due process of law." 191 U.S. at 137. Thus, it would appear that the *Taylor* and *Whorton* cases have clarified former precedent.

[38] Coffin v. United States, 156 U.S. 432 (1895).

[39] 441 U.S. at 789.

[40] Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial in state criminal case); Miller v. Pate, 386 U.S. 1 (1967) (district attorney knowingly used perjured testimony); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Berger v. United States, 295 U.S. 78 (1935) (prosecutor's use of improper assertions and insinuations).

discredit the reliability of the verdict.[41] *Miranda*[42] violations or search and seizure violations are likely to taint the entire trial process, and thereby disturb the reliability of the verdict. In contrast, omission of the presumption-of-innocence instruction does not affect the entire trial process. The instruction serves a cautionary or, at best, remedial function by allocating the burden of proof and admonishing the jury to consider only legal evidence in reaching the verdict.[43] While the instruction is especially important to a fair trial if the evidence conflicts,[44] it serves a questionable function when the evidence is overwhelmingly against the defendant.

B. *A Comparison of the Facts of* Taylor *and* Whorton

In *Whorton v. Commonwealth*,[45] the Supreme Court of Kentucky held that the United States Supreme Court's decision in *Taylor* established a constitutional right that was not subject to the *Chapman-Harrington*[46] harmless-error rule.[47]

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[41] The effect of an error which discredits the reliability of a fair and just verdict cannot be isolated; the error has influenced the entire trial process. For example, if the judge has a pecuniary interest in the verdict, there is no way to know whether his biases affected discretionary decisions. Note, *Harmless Constitutional Error—A Reappraisal*, 83 HARV. L. REV. 814 (1970). *See* Tumey v. Ohio, 273 U.S. 510 (1927). *See also* Hamilton v. Alabama, 368 U.S. 52 (1961).

[42] Miranda v. Arizona, 384 U.S. 436 (1966).

[43] *See* 9 WIGMORE ON EVIDENCE § 2511 (1940 & Supp. 1979).

[44] People v. Long, 95 N.E.2d 461, 463 (Ill. 1950).

[45] 570 S.W.2d 627 (Ky. 1978), *rev'd*, 441 U.S. 786 (1979).

[46] The *Chapman-Harrington* test is the federal harmless-error rule and is applicable to constitutional errors. Chapman v. California, 386 U.S. 18 (1967), established the principle that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22. The Court stated that the test of whether a constitutional error could be held harmless required the reviewing court to find the error "harmless beyond a reasonable doubt." *Id.* at 24. This federal standard was modified two years later in Harrington v. California, 395 U.S. 250 (1969), wherein the Court stated that the effect of the error must be analyzed vis-a-vis the other evidence in the case. Under the *Chapman-Harrington* test, if the legal evidence is independently overwhelming against the defendant, some constitutional errors are harmless beyond a reasonable doubt. However, some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. at 23. The Court in *Chapman* indicated that perhaps Gideon v. Wainwright, 372 U.S. 335 (1963) (lack of counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); and Tumey v. Ohio, 273 U.S. 510 (1927) (judge with pecuniary interest in

Even though the evidence in *Whorton* was overwhelmingly against the defendant, the Kentucky Court insisted that the defendant's right to the presumption-of-innocence instruction was absolute and not to be measured in light of the circumstances of each case.[48] The Court would have avoided being reversed in *Kentucky v. Whorton*[49] had it distinguished *Whorton* from *Taylor* by focusing on the extraordinary need for the presumption-of-innocence instruction in the *Taylor* trial in order to negate the effect of other prejudicial factors.

Analysis of the facts surrounding the *Taylor* trial reveals several prejudicial errors and generally scant evidence against the defendant. The *Taylor* trial was unusual because several damaging circumstances, although not independently reversible errors, in the aggregate violated due process absent an instruction on the presumption of innocence. In *Taylor* the United States Supreme Court outlined four factors that were detrimental to a fair trial in that case: 1) the alleged "skeletal [jury] instructions,"[50] 2) the prosecutor's incriminating references to the indictment,[51] 3) improper comments in the prosecutor's closing argument,[52] and 4) the virtual "swearing contest between victim and accused."[53]

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outcome of case), typify a kind of constitutional violation that pervades the entire trial, thereby rendering an unfair trial. A violation that influences the whole trial process and disturbs the reliability of adjudication cannot be isolated to allow application of the overwhelming evidence test promulgated in *Harrington.* Therefore, these errors are subject to automatic reversal. *See generally* Mause, *Harmless Constitutional Error: The Implications of Chapman v. California,* 53 MINN. L. REV. 519 (1969); Note, *Harmless Constitutional Error—A Reappraisal,* 83 HARV. L. REV. 814 (1970); Note, *Harmless Constitutional Error,* 20 STAN. L. REV. 83 (1967).

[47] 570 S.W.2d at 633.

[48] *Id.* at 632. The majority stated that while they would like to hold that the *Taylor* requirement was subject to the harmless-error rule, they were afraid that "it might not stick." *Id.* at 633.

[49] 441 U.S. 786 (1979).

[50] The jury was instructed on the specific elements of the crime and on reasonable doubt. 436 U.S. at 481 n.7.

[51] The prosecutor read the indictment in his opening statement, implying guilt from the fact of the indictment. An instruction that the indictment is not evidence was denied. 436 U.S. at 481.

[52] The prosecutor declared that the defendant, "*like every other defendant* who's ever been tried" and convicted, had the presumption of innocence until proven guilty. This statement equated the defendant with every guilty defendant by implying that his status as a defendant was evidence of his guilt. *Id.* at 486-87.

[53] The robbery victim was the prosecution's only witness and the petitioner was

The latter three of these factors bear directly on the accused's guilt or innocence. A presumption-of-innocence instruction was important to counter the damaging implications made by the prosecutor and to allocate expressly the burden of proof in the "swearing contest." Undoubtedly, the four factors were influential in the Supreme Court's holding; absent the cumulative effect of these factors, it is unlikely that the Court would have reversed the *Taylor* conviction.

Further indication that the Supreme Court was impressed by the cumulative effect of the errors and not solely by the omitted presumption-of-innocence instruction is found from a close analysis of the language in the opinion. The Court held that "on the facts of this case"[54] failure to give the requested presumption-of-innocence instruction resulted in a violation of due process of law. Similarly, the Court referred to a "particular need for such an instruction in *this* case,"[55] due to the "cumulative effect of the potentially damaging circumstances of *this* case."[56] The language indicates that the United States Supreme Court did not contemplate a per se rule in the *Taylor* decision.

Analysis of the facts in the *Whorton* case reveals that the evidence was much stronger against the defendant, Harold Whorton, than it was against the accused in *Taylor*.[57] Although as the trial began the indictment was read into the record without an accompanying instruction that it was not evidence of the defendant's guilt, the prosecutor did not imply the defendant's guilt from the fact of the indictment.[58] The prosecution subsequently produced fifteen eyewitnesses who testified against Whorton.[59] Whorton did not testify on his own behalf, but his wife and sister-in-law offered alibi testimony.[60] No further evidence was produced by the defense.[61]

As in *Taylor*, the trial court refused a properly-tendered

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the only witness for the defense. *Id.* at 488.

[54] *Id.* at 490.

[55] *Id.* at 488 (emphasis added).

[56] *Id.* at 487 n.15 (emphasis added).

[57] 570 S.W.2d at 632.

[58] *Id.* at 637 (Clayton, J., dissenting).

[59] *Id.*

[60] *Id.* at 629.

[61] *Id.*

instruction on the presumption of innocence.[62] However, unlike the facts in *Taylor* there was no "swearing contest" and the presumption-of-innocence instruction was not required to negate the prosecutor's implications. Nonetheless, in *Whorton* the Supreme Court of Kentucky reversed the defendant's conviction, holding that *Taylor* created an across-the-board constitutional right to the presumption-of-innocence instruction.

II. WHAT DOES *Kentucky v. Whorton* MEAN?

The United States Supreme Court held in *Kentucky v. Whorton*[63] that the due process clause of the fourteenth amendment does not require the presumption-of-innocence instruction in every case, and that the Court's decision in *Taylor* simply meant that failure to give the presumption-of-innocence instruction must be evaluated under all of the circumstances of the trial, including other restrictions, the weight of the evidence, arguments of counsel and other relevant elements. If, as in *Taylor,* the facts of the case cumulatively present the risk that failure to give the instruction deprived the defendant of a fair trial, the defendant is entitled to a new trial under due process of law. Thus, the Court did not establish a new constitutional rule of law, but only reaffirmed the defendant's constitutional right to a fair trial.

However, *Whorton* leaves appellate courts with some unanswered questions. The decision fails to clarify the importance of the relationship and interaction of the instruction with other trial errors. Indeed, *Whorton* may be read to mean that the presumption-of-innocence instruction can "cure" other errors. The Court focused on the cumulative effect of the type and number of prejudicial factors that occurred in the *Taylor* trial[64] and implied that had the presumption-of-innocence instruction been given, the defendant would have received a fair trial. It is difficult to comprehend how the presence of the presumption-of-innocence instruction counteracts the cumula-

[62] The tendered instruction was similar to the one tendered in *Taylor. Id.* at 630. *See* note 9 *supra* for the text of the instruction.

[63] 441 U.S. 786 (1979).

[64] *Id.* at 788-89. *See* notes 50-53 *supra* for a discussion of the prejudicial factors in the *Taylor* trial.

tive effect of other prejudicial trial circumstances. As in *Taylor,* some trial errors and prejudicial factors, although not independent constitutional errors, cumulatively cause constitutional error under the totality of the circumstances.[65] Additionally, some constitutional errors are subject to the *Chapman-Harrington* harmless-error test, which essentially evaluates the error in light of the totality of the circumstances.[66] If appellate review concentrates on the total circumstances of a trial, the presence or absence of a single instruction should not decisively tip the scales of fairness under due process of law.

The *Whorton* decision also may be read to imply that the presumption-of-innocence instruction can only be used to "cure" certain kinds of errors; if this is so, the key analysis involves the character and number of the errors at the trial level. The *Taylor* opinion referred to the "purging effect" of the presumption-of-innocence instruction as one way to protect the accused's constitutional right to be judged only on legal evidence admitted at trial.[67] In *Taylor,* the instruction was desirable to counter the prosecutor's incriminating statements and the trial court's refusal to instruct that the indictment was not evidence of the accused's guilt. Additionally, the instruction was important to allocate the burden of proof in the "swearing contest" between the victim and the accused. Under this approach the presumption-of-innocence instruction plays a credible role as a "cure" only when other circumstances of a trial threaten the presumption of innocence[68] guaranteed a defendant. The presumption was directly challenged by the circumstances occurring in *Taylor,* and therefore the instruction may have served a viable function. However, if the errors or circum-

[65] 436 U.S. at 487 n.15. Although each of several prejudicial factors considered in isolation may be disregarded as harmless, these factors when considered in the aggregate are sometimes so prejudicial to a fair trial that they jointly become reversible error. *See also* Delzell v. Day, 223 P.2d 625 (Cal. 1950); Faught v. Washam, 329 S.W.2d 588 (Mo. 1959); *In re* Santrucek, 145 N.E. 739 (N.Y. 1924).

[66] *See* note 46 *supra* for a detailed discussion of the *Chapman-Harrington* federal harmless-error rule.

[67] 436 U.S. at 486. *See* United States v. Thaxton, 483 F.2d 1071, 1073 (5th Cir. 1973).

[68] Estelle v. Williams, 425 U.S. 501, 503 (1976); Coffin v. United States, 156 U.S. 432 (1895).

stances in the *Taylor* trial had been unrelated to the presumption of innocence, the instruction's ability to "cure" would have been far more tenuous.

In *Taylor,* the cumulative effect of prejudicial factors heightened the Supreme Court's concern that the defendant did not receive a fair trial.[69] Dissimilarly, the *Whorton* trial was not plagued by prejudicial factors and the evidence was overwhelmingly against the accused. Considering the cumulative effect of all of the trial circumstances, the *Whorton* and *Taylor* trials are at opposite ends of a "fairness" scale. The *Whorton* decision leaves open the question of whether the urgency for the presumption-of-innocence instruction increases in reverse proportion to the trial's "fairness" or whether it relates to the ability of the instruction to "cure" particular types of errors.

Furthermore, *Whorton* does little to define the role of the presumption-of-innocence instruction vis-à-vis other trial circumstances. Instead, it is clear that the defendant is entitled to the instruction only when some unspecific factors threaten the defendant's constitutional right to the nebulous concept of a "fair trial." Appellate courts are now faced with totalling numberless factors to determine whether the accused received a fair trial without the presumption-of-innocence instruction.

III. *Kentucky v. Whorton:* THE EFFECT ON KENTUCKY LAW

After the United States Supreme Court decided *Taylor v. Kentucky,*[70] RCr 9.56[71] was amended to require the presumption-of-innocence instruction in every criminal case. In order to analyze the effect of the *Whorton* decision on Kentucky law it is imperative to distinguish those cases involving convictions obtained prior to the rule amendment and those cases involving convictions obtained after the change.[72]

In cases where convictions were obtained before the amended RCr 9.56 was effective, appellate review is bound by

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[69] *See* notes 50-53 *supra* for a discussion of the cumulative effect of errors in the *Taylor* trial.

[70] 436 U.S. 478 (1978).

[71] KY. R. CRIM. P. 9.56 (amended June 8, 1978, effective July 1, 1978). The rule states: "(1) In every case the jury shall be instructed substantially as follows: 'The law presumes a defendant to be innocent of a crime . . . .'"

[72] The amendment was effective as of July 1, 1978. *Id.*

the holding in *Kentucky v. Whorton.*[73] Under *Whorton,* the reviewing court must study all elements of the defendant's trial to determine whether failure to give the presumption-of-innocence instruction deprived the accused of a fair trial.[74] If the court finds that under the totality of the circumstances omission of the instruction deprived the accused of a fair trial, the conviction must be reversed. If the evidence is overwhelmingly against the defendant and the trial is not tainted by other errors, failure to give the presumption-of-innocence instruction will not alone deprive the accused of a fair trial.[75]

Clearly, states may supplement or broaden the protections that the Constitution provides.[76] Accordingly, state courts may require the presumption-of-innocence instruction as a matter of state law in spite of *Whorton.*[77] Therefore, appellate review of convictions obtained after the amendment of RCr 9.56 involves a different analysis. The rule states, in relevant part, that in every case the jury must be instructed that the law presumes the defendant is innocent.[78] However, the amended rule does not preclude inadvertent error. It is not clear what role *Kentucky v. Whorton*[79] will play in the event that error under the amended rule results from failure to give the presumption-of-innocence instruction.

Essentially, the rule was amended because the Supreme Court of Kentucky misinterpreted *Taylor.*[80] Now that *Kentucky v. Whorton* has clarified *Taylor,* the portion of RCr 9.56 that requires the presumption-of-innocence instruction

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[73] 441 U.S. 786 (1979).

[74] *Id.*

[75] Similarly, the Court in Cupp v. Naughten, 414 U.S. 141 (1973), stated that an instruction cannot be considered in isolation but must be viewed against the entire trial. *Accord,* Boyd v. United States, 271 U.S. 104 (1926).

[76] *E.g.,* Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting); Cooper v. Cal., 386 U.S. 58, 62 (1967). *See also* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976).

[77] *See* note 4 *supra* for citation to states that require the presumption-of-innocence instruction.

[78] *See* note 71 *supra* for the relevant portion of the rule.

[79] 441 U.S. 786 (1979).

[80] In the past, Kentucky has proscribed presumptions generally, and the presumption-of-innocence instruction, specifically, as part of jury instructions. *See* notes 5 and 35 *supra* for more discussion. However, within one week after the *Taylor* decision, the Supreme Court of Kentucky amended KY. R. CRIM. P. 9.56 to require the presumption-of-innocence instruction.

may be repealed. If the presumption-of-innocence instruction is retained as part of state criminal procedure, appellate courts may choose to apply the state harmless-error provision[81] to resultant errors or may elect to automatically reverse all errors.

The state harmless-error provision mandates that all errors not affecting "substantial rights" shall be disregarded.[82] Although it is clear from *Whorton* that omission of the presumption-of-innocence instruction does not alone abridge constitutional rights, the omitted instruction can contribute to constitutional error.[83] Therefore, if a court applies the state harmless-error provision to errors involving the presumption-of-innocence instruction, the court's inquiry must be directed to both the accused's substantial rights under state law and to the accused's constitutional rights under federal law.

As was the case in *Taylor,* if other errors taint the trial or if the evidence against the defendant is weak, the accused's constitutional rights may be affected by a failure to instruct on the presumption of innocence. The *Whorton* decision makes it clear that the failure to give the presumption-of-innocence instruction must be evaluated vis-à-vis the totality of the circumstances to determine whether the defendant received a fair trial. If the reviewing court determines after considering all of the circumstances that the accused's rights have been violated, federal constitutional law intercedes and demands reversal of the conviction. Thus, if the Kentucky courts chose to apply the state harmless-error provision to the failure to give the presumption-of-innocence instruction, they must necessarily refer to the United States Supreme Court's decision in *Whorton* to determine whether or not the error was in fact "harmless"; in such cases, the *Whorton* decision will continue to influence Kentucky law.

While it is hazardous to predict the path that any court will follow, if the amended RCr 9.56 remains in effect, it is likely that the Supreme Court of Kentucky will reverse all convictions appealed on grounds that the trial court failed to instruct on the presumption of innocence. The rule is unambig-

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[81] KY. R. CRIM. P. 9.24.

[82] *Id.* The rule reads: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

[83] *See* note 65 *supra* for a discussion of cumulative prejudice of errors.

uous and mandates that the instruction be given in every criminal case.[84] Additionally, the Supreme Court of Kentucky demonstrated in *Whorton v. Commonwealth* and subsequent cases[85] a rigid unwillingness to subject the then misconstrued constitutional error to the *Chapman-Harrington* federal harmless-error rule.[86] For these reasons, the Court probably will reject application of the harmless-error doctrine to errors of RCr 9.56 and will automatically reverse all such errors.

In summary, the impact that *Kentucky v. Whorton* will have on Kentucky courts is yet to be seen. *Whorton* will control and guide appellate review of all convictions obtained before RCr 9.56 was amended. Additionally, *Whorton* subsequently will control appellate review if the rule amendment is repealed. If the rule is retained as it presently exists, *Whorton* will influence appellate courts reviewing convictions obtained after the rule amendment only if the appellate courts apply the state harmless-error rule. Finally, if the courts elect to automatically reverse all judgments where the trial court fails to instruct on the presumption of innocence, the protections of Kentucky law will supersede those established in *Whorton.* In light of the likelihood that the Kentucky courts will read RCr 9.56 to require automatic reversal if the presumption-of-innocence instruction is denied, the *Whorton* decision should have a rather negligible impact on Kentucky law.

CONCLUSION

In *Kentucky v. Whorton,* the United States Supreme Court firmly established that the due process clause of the

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[84] KY. R. CRIM. P. 9.56.

[85] Watson v. Commonwealth, No. 78-SC-300-MR (Ky. Feb. 27, 1979); Avery v. Commonwealth, No. 78-SC-75-MR (Ky. July 25, 1978); Williams v. Commonwealth, No. 78-SC-68-MR (Ky. July 25, 1978).

[86] In *Whorton,* the Supreme Court of Kentucky was reluctant to apply the *Chapman-Harrington* harmless-error rule for fear of reversal by the United States Supreme Court. 570 S.W.2d at 633. Curiously, Watson v. Commonwealth, No. 78-SC-300-MR (Ky. Feb. 27, 1979), subsequently held that the Court in *Whorton* had elected "as a matter of state law" not to apply the *Chapman-Harrington* rule to the then misconceived constitutional right.

At this point it is unclear whether the Supreme Court of Kentucky will apply the harmless-error rule to errors involving the failure to give the presumption-of-innocence instruction. However, the *Watson* holding is now clearly meaningless since it was based on false underpinnings.

fourteenth amendment does not entitle every defendant to the presumption-of-innocence instruction. The instruction is merely a single element of the entire trial process that must be evaluated to determine whether the accused received a fair trial. The Court gave little guidance to appellate courts faced with the task of determining when the instruction is crucial and when it is immaterial. Indeed, for many appellate courts the future is likely to be fraught with frustration. Kentucky courts, however, might escape direct confrontation with the problems inherent in the *Whorton* precedent. If the legislature retains RCr 9.56 as amended, and if the courts subject errors under the rule to automatic reversal, the protections of state law will supersede the constitutional law implicit in *Whorton.*

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